HANAFIAH MUHAMMAD A

v.

SOUTHERN BANK BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: S3-24-901-04]
26 APRIL 2005

CIVIL PROCEDURE: *Declaration - Application for - Whether declaration was a right remedy for party aggrieved with error in proclamation of sale* C

LAND LAW: *Sale of land - Sale by auction - Setting aside - Material irregularity in conduct of sale - Error in proclamation of sale and newspaper advertisement as to postal address of property in question - Chargor aware of error well in advance before date of auction but took no action - Whether error was a minor technical error - Whether members of public misled by error - Whether any prejudice caused to chargor* D

The plaintiff was the owner of a condominium unit known as Unit L7-03-E1 Block 7, Bungaraya Condominium. For the purpose of the purchase of the condominium unit, the plaintiff obtained a loan from the 1st defendant bank. The plaintiff later defaulted on the repayments of the loan and the first defendant commenced foreclosure proceeding. The order for sale was issued by the court and the first date appointed for public auction was 13 December 2000. However, for some reasons the public auction did not take place on 13 December 2000 and neither on some other dates thereafter and only took place on 16 February 2004. Prior to this auction date the proclamation of sale was issued and advertised in the newspaper but unfortunately the postal address in the proclamation was wrongly stated as Unit No. 7B-03-01. Upon being alerted of the mistake, on the day of the public auction, before the commencement of the auction, the Deputy Registrar and the auctioneer announced to the members of the public present in the auction room of the mistake and made the necessary corrections in the proclamation notice and in the court's file. Thereafter, the public auction was carried out, and the second and third defendants were the successful bidders. The plaintiff then applied through this originating summons for declarations that he E F G H I

A was the lawful owner of Unit L7-03-E1, Block 7 and not Unit No. 7B-03-01. The plaintiff claimed that he was aggrieved by the error in advertised proclamation.

Held (dismissing the originating summons with costs):

B **(1)** On the facts of the case, a declaration was not the right remedy. If the plaintiff was aggrieved with the error in the proclamation of sale and the newspaper advertisement, as to the postal address of the property in question, then what should have been prayed for was an order to set aside the C sale that was carried out by the Deputy Registrar as being null and void. Or, alternatively, the plaintiff should have appealed to the judge in chambers pursuant to O. 56 of the Rules of the High Court against the decision of the Deputy Registrar of the High Court in proceeding with the auction in spite of D the objection by the plaintiff. (paras 9 & 12)

(2) The error was a minor technical error and the plaintiff knew what was intended to be sold by public auction under the proclamation and advertisement was his condominium unit: E No. L7-03-E1, Block 7, Bunga Raya Condominium. There was no evidence that members of the public were misled by the error; or that the plaintiff was in any way prejudiced. (para 15)

F **(3)** The plaintiff was aware of the pending auction to be held on 16 February 2004 and the mistake in the proclamation well in advance before the date of the auction but he, however, took no action to alert either the auctioneers or the Deputy Registrar of the court of the error. (para 16)

G **Legislation referred to:**
Auction Sales Enactment 1929, s. 4
Rules of the High Court 1980, O. 56, O. 83

For the plaintiff - S Bala; M/s SBS Maniam Assoc
H *For the 1st defendant - Kingston Tan; M/s Heily Hassan, Tan & Partners*

Reported by Amutha Suppayah

I

JUDGMENT

Hishamudin Mohd Yunus J:

[1] This originating summons is an application by the plaintiff for the following declarations:

(a) that he is the lawful owner of a property known as Unit L7-03-E1, Block 7 which has a postal address known as:

7A-03-03 Bungaraya Kondo Saujana Resort,

Seksyen U2

40150 Shah Alam

and which is held under a master title known as P.T. 74, H.S. (D) 86887 Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan;

and

(b) that he is not the owner of a property known as Unit No. 7B-03-01 held under a master title known as P.T. 74, H.S. (D) 86887 Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan.

[2] I had dismissed the originating summons with costs.

[3] The facts of the case are not disputed. The plaintiff at the material time was the owner of a condominium unit known as Unit L7-03-E1 Block 7, Bungaraya Condominium, having its postal address as:

7A-03-03 Bungaraya Kondo Saujana Resort,

Seksyen U2

40150 Shah Alam

[4] For the purpose of the purchase of the condominium unit from the vendor/developer, the plaintiff applied for and obtained a loan from the 1st defendant bank (Southern Bank). But as at the time of the application of the loan the condominium unit did not yet have a strata title (there was only the master title H.S.(D) P.T. 74 86887 Mukim Damansara), the plaintiff's rights under the sale and purchase agreement with the vendor/developer *vis-a-vis* the property was assigned to the bank as security under a loan

cum assignment agreement (the strata title was subsequently issued by the Land Office in August 2002; however, when the present originating summons was filed in May 2004, the strata title issued was still registered under the name of the vendor/developer). The plaintiff, however, defaulted on the repayments of the loan. Hence, the 1st defendant commenced foreclosure proceeding against the plaintiff for a sale order pursuant to O. 83 of the Rules of the High Court 1980. The order for sale was issued by the High Court of Kuala Lumpur on 5 September 2000. Thereafter, pursuant to a summons for directions before the Deputy Registrar, the first date of public auction was appointed by the Deputy Registrar: it was at 13 December 2000. The reserved price was fixed by the Deputy Registrar at RM648,000.

[5] For some reasons the public auction did not take place on 13 December 2000; neither on some other dates thereafter (there was also an occasion when the auction was aborted due to absence of bidders). The public auction eventually took place but this was much later, that is, on 16 February 2004. Prior to this auction date of 16 February 2004, the proclamation of sale was issued and advertised in the newspaper by the court appointed auctioneers (the 4th and 5th defendants). But rather unfortunately the postal address in the proclamation was wrongly stated as being:

> Unit No. 7B-03-01
>
> 2nd Floor, Block 7B,
>
> Bunga Raya Condominium 41200 Subang
>
> Selangor Darul Ehsan

[6] The 1st defendant's valuer alerted the 1st defendant of this mistake by a letter dated 14 February 2004. Hence, on the day of the public auction (16 February), before the commencement of the public auction, the 1st defendant's officer/representative who was present at the auction room informed the auctioneer and the Deputy Registrar of the High Court having charge of the auction sale of the mistake in the proclamation. The Deputy Registrar and the auctioneer then announced to the members of the public present in the auction room of the mistake and made the necessary corrections in the proclamation notice and in the court's file. Thereafter, the public auction was carried out, and the 2nd and 3rd defendants were the successful bidders.

[7] In the present case, the 4th defendant was the auctioneer that carried out the public auction on 16 February 2004, under the supervision of the Deputy Registrar of the High Court. The 4th defendant was the director of the 5th defendant at the material time.

[8] I shall now deliver my grounds.

[9] Firstly, on the facts of the case, I do not think that a declaration is the right remedy. The plaintiff claims that he is unhappy with the way the public auction was carried out on 16 February 2004 by the auctioneers and Deputy Registrar of the High Court. In particular, he is aggrieved by the fact that there was an error in proclamation advertised in the Malay Mail issue of 3 February 2004 which described the property to be auctioned as having the following postal address:

Unit No. 7B-03-01

2nd Floor, Block 7B,

Bunga Raya Condominium

41200 Subang

Selangor Darul Ehsan

[10] In his supporting affidavit, the plaintiff asserts that he is the lawful owner of a property situated at Unit No. L7-03-E1 at Building Block 7, held under a master title known as P.T. 74, H.S.(D) 86887, Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan. The plaintiff further avers that he had on the day of the auction but prior to the auction pointed out to the Deputy Registrar and the appointed auctioneers of the error on the proclamation and had objected to the auction being proceeded with.

[11] It is to be observed that the order of sale that has been previously issued by the court is not disputed; nor is the description of the master title in the proclamation and advertisement (that is, P. T. 74, H. S. (D) 86887, Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan). It is also not disputed that the property in question is known as Unit No. L7-03-E1, Blok 7, Bungaraya Kondo.

[12] Now, in my judgment, if the plaintiff is aggrieved with the error in the proclamation of sale and the newspaper advertisement, as to the postal address of the property in question, then what should have been prayed for in the instant originating summons is an order to set aside the sale that was carried out by the Deputy Registrar as being null and void. Or, alternatively, the plaintiff should have appealed to the judge in chambers pursuant to O. 56 of the Rules of the High Court against the decision of the Deputy Registrar of the High in proceeding with the auction in spite of the objection by the plaintiff. Certainly it is not appropriate as a matter of law to ask for a declaration.

[13] In any case, to my mind, and with respect, clearly it does not make sense to apply for the two declarations prayed for; since, after all, it is not disputed by the defendants that the plaintiff is the lawful owner of the condominium unit in question, that the description of the postal address of the property in question in the proclamation of sale was factually not correct; and that there was no intention on the part of the defendants to hold a public auction in respect of Unit No. 7B-03-01. In fact on the day of the auction itself, in the auction room, prior to the carrying out of the auction, the Deputy Registrar and the 4th defendant (the auctioneer) had taken steps (and, I would say, correctly) to announce to those present in the auction room of the mistake in the description of the postal address in the proclamation; and, thereafter, the Deputy Registrar had appropriately made the necessary corrections in the proclamation and in the court's file.

[14] Now, be that as it may, even if the plaintiff insists on seeking a declaration, as has happened in the present case, and taking the hypothesis that the plaintiff is entitled to ask for a declaration, then, should not the declaration that is sought be worded differently, that is, a declaration to the effect that the sale *via* the public auction to the 2nd and 3rd defendants was null and void by reason of the said error in the proclamation (instead of in the manner the prayers for declarations are presently worded)? In the light of the issue at hand, the prayers sought by the plaintiff, as presently worded, are meaningless (if not confusing).

[15] Secondly, the error was a minor technical error and the plaintiff knew what was intended to be sold by public auction under the proclamation and advertisement was his condominium unit: No. L7-03-E1, Block 7, Bunga Raya Condominium. There

was no evidence that members of the public were misled by the error; or that the plaintiff was in any way prejudiced. On the contrary members of the public turned up for the auction, and there were several bidders; and the property was sold off to the 2nd and 3rd defendants as the successful bidders. Indeed, the plaintiff was also present at the auction (but had objected to the carrying out of the sale by reason of the mistake in the proclamation). In other words, in the present case, the plaintiff was making a mountain out of a mole hill.

[16] Thirdly, the plaintiff was aware of the pending auction to be held on 16 February 2004 and the mistake in the proclamation well in advance before the date of the auction (even way back to the proclamation advertised in the year 2000), but he, however, took no action to alert the either the auctioneers or the Deputy Registrar of the court of the error.

[17] The plaintiff's counsel submitted that it was wrong for the Deputy Registrar to have merely announced the mistake in the auction room on the day of the auction and then to have corrected the error in the proclamation notice and in the court's file. The learned counsel submitted that, since the plaintiff prior to the auction had objected to the sale being proceeded with by reason of the error, the Deputy Registrar should have postponed the sale and reissued a fresh proclamation notice, referring to s. 4 of the Auction Sales Enactment 1929 (F.M.S. Cap 81).

[18] The provision reads:

> **4. Notice of sale.**
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> (1) Every auctioneer shall before conducting a sale by public auction give public notice thereof, setting out the particulars of the property to be offered for sale, and stating the time and place at which the auction will be held.
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> (2) Such notice shall be given not less than seven days before the date fixed for the auction; provided that with the permission in writing of the Chief Police Officer the period of such notice may be reduced to two days.

[19] With respect, I am unable to accept learned counsel's submission. In my view, the above provision has already been duly complied with when the licensed auctioneers published the proclamation of sale in the Malay Mail. There is no necessity to

A postpone the auction as the mistake was minor and technical in nature and members of the public including the plaintiff was not in anyway misled or prejudiced. In fact the plaintiff himself turned up for the auction, and there were several bidders. And not only that: the plaintiff had advanced knowledge of the mistake way back
B to the year 2000 (when the first proclamation was issued) but had kept quiet, and only on the very day of the auction itself that he notified the Deputy Registrar of the mistake regarding the address in the notice of proclamation.

C [Originating summons dismissed with costs]

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